

THE HONORABLE JOHN C. COUGHENOUR

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

RINKY DINK, INC. d/b/a PET STOP, a
Washington corporation; and FRANK KNOTT,
a Washington resident, individually and on
behalf of all others similarly situated,

Plaintiffs,

vs.

ELECTRONIC MERCHANT SYSTEMS,
INC. d/b/a ACCEPT CREDIT CARD
SERVICES, a Delaware corporation; JEFFREY
GEHRS, a Virginia resident; and CALLFIRE,
INC., a California corporation,

Defendants.

NO. 2:13-cv-01347-JCC

**PLAINTIFFS' MOTION FOR
AMENDMENT OF ORDER AND
FED. R. CIV. P. 54(b)
CERTIFICATION**

Note on Motion Calendar: 3/20/15

I. RELIEF REQUESTED

Plaintiffs Rinky Dink, Inc. and Frank Knott respectfully request that this Court amend its Order Sealing Documents and Granting Defendant CallFire's Motion for Summary Judgment (Dkt. No. 113) dated February 24, 2015, to include specific findings that Fed. R. Civ. P. 54(b) certification is appropriate, there is no just reason for delay, and directing that the Order Sealing Documents and Granting Defendant CallFire's Motion for Summary Judgment shall be deemed a final judgment with respect to CallFire, Inc. ("CallFire").

II. STATEMENT OF FACTS

This Court entered an Order Sealing Documents and Granting Defendant CallFire's Motion for Summary Judgment ("Order") on February 24, 2015 (Dkt. No. 113). The Order grants summary judgment to Defendant CallFire, thereby terminating all claims against CallFire. It does not make any Fed. R. Civ. P. 54(b) findings and does not direct entry of judgment against the Plaintiffs. Plaintiffs' claims against Defendants Electronic Merchant Systems ("EMS") and Jeffrey Gehrs ("Gehrs") remain for trial.

Fed. R. Civ. P. 54(b) provides that a court may direct entry of final judgment as to fewer than all the parties where there is no just reason to delay appeal. Fed. R. Civ. P. 54(b). This standard is met in this case. There is no just reason for delay because there is no possibility that continuing litigation will yield any facts or legal conclusions relevant to the issues for appeal: (1) whether CallFire "made" or "initiated" calls under the meaning of the TCPA; and (2) whether CallFire's common carrier status extinguishes any liability under the TCPA absent a high degree of involvement. Immediate appeal will also expedite the future handling of the remaining unadjudicated claims, and will avoid any possibility of duplicative trials or appeals. Accordingly, Fed. R. Civ. P. 54(b) certification is proper.

III. STATEMENT OF THE ISSUE

Whether this Court should direct that certification is appropriate, there is no just reason for delay, and the Order Sealing Documents and Granting Defendant CallFire's Motion for Summary Judgment shall be deemed a final judgment.

IV. EVIDENCE RELIED UPON

Plaintiffs rely upon the documents and pleadings on file in this case and the legal authority cited herein.

V. AUTHORITY

Federal Rule of Civil Procedure 54(b) provides that final entry of judgment should be made on individual claims in suits that involve multiple claims provided that there is no just

1 reason for delay. Fed. R. Civ. P. 54(b); *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465
 2 F.3d 946, 954 (9th Cir. 2006). This involves a two part inquiry. First, the court must determine
 3 that it is dealing with a final judgment. *Curtiss-Wright Corp. v. General Elect. Co.*, 446 U.S. 1,
 4 7 (1980). The claim that is the subject of the Rule 54(b) motion “must be a ‘judgment’ in the
 5 sense that it is a decision upon a cognizable claim for relief, and it must be ‘final’ in the sense
 6 that it is ‘an ultimate disposition of an individual claim entered in the court of a multiple claims
 7 action’” *Id.* (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956); *see also DZ*
 8 *Bank AG Deutsche Zentral Genossenschaftsbank v. Choice Cash Advance, LLC*, No. 11-
 9 1312JLR, 2013 WL 784543, at *2 (W. D. Wash. Mar. 1, 2013) (finding that “there is no
 10 question” that an order granting plaintiff’s motion for summary judgment against one defendant
 11 was a final judgment where it disposed of plaintiff’s only claim against that particular
 12 defendant).

13 Here, the Court has dismissed Plaintiffs’ claims against CallFire in their entirety by
 14 granting CallFire’s motion for summary judgment. *See* Dkt. No. 113. Adopting the court’s
 15 reasoning in *DZ Bank*, there is no question that the Court’s entry of summary judgment was a
 16 final judgment with respect to CallFire for the purposes of Rule 54(b) certification.

17 The second question is whether there is any just reason for delay. *Curtiss-Wright*, 446
 18 U.S. at 7. The trial court is vested with the discretion to determine the appropriate time when
 19 an issue in a multiple claims action is ready for appeal. *Id.* at 8. Paramount to this
 20 determination is “the interest of sound judicial administration.” *Id.* The Ninth Circuit
 21 embraces a “pragmatic approach focusing on severability and efficient judicial administration.”
 22 *Wood v. GCC Bend, LLC*, 422 F.3d 873, 880 (9th Cir. 2005). Rule 54(b) certification should
 23 be granted if doing so will streamline the ensuing litigation. *Noel v. Hall*, 568 F.3d 743, 747
 24 (9th Cir. 2009).

25 Under this prong, courts consider (1) whether the claims under review are separable
 26 from the remaining claims and (2) whether the nature of the claims already decided is such that
 27

the appellate court will not be faced with deciding the same issue multiple times. *Curtiss-Wright*, 446 U.S. at 7–10. Where the court grants summary judgment dismissing a plaintiff’s claim against one defendant, the issue is separable from the plaintiff’s claims against the remaining defendant. *See, e.g., DZ Bank*, 2013 WL 784543 at *3 (finding plaintiff’s claim for breach of a loan agreement against one defendant could be separated from plaintiff’s claims against another defendant for breach of their personal guaranties). Even claims that are not separate and independent from the remaining claims may be certified under Rule 54(b) as long as “resolving the claims would streamline the ensuing litigation.” *Noel*, 568 F.3d at 747.

Moreover, whether some facts underlying the Rule 54(b) claim and the remaining claims may overlap does not preclude entry of a Rule 54(b) final judgment. *See Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1316 (9th Cir. 1979) (finding the argument that “some facts are common to all of [plaintiff’s] ‘theories of recovery’” insufficient to overturn entry of Rule 54(b) final judgment).

Here, there is no just reason for delay because Plaintiff’s claims against CallFire are separable and distinct from the remaining litigation against EMS and Jeffrey Gehrs. Therefore, there is no possibility that continuing litigation will yield any facts or legal conclusions relevant to the issues for appeal: (1) whether CallFire “made” or “initiated” calls under the meaning of the TCPA; and (2) whether CallFire’s common carrier status extinguishes any liability under the TCPA absent a high degree of involvement. Immediate appeal will also expedite the future handling of the remaining unadjudicated claims, and will avoid any possibility of duplicative trials or appeals.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Amendment of Order and CR 54(b) Certification. A proposed amended order is attached hereto.

1 RESPECTFULLY SUBMITTED AND DATED this 3rd day of March, 2015.

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on March 3, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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